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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 PATRICIA JOHNSTON,

11 Plaintiff,

12 v.

13 ALLSTATE INSURANCE  
14 COMPANY,

15 Defendant.

NO. 13-CV-574-MMA(BLM)

ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANT'S MOTION TO  
DISMISS

[Doc. No. 4.]

16 Defendant Allstate Insurance Company ("Allstate") moves the Court to  
17 dismiss Plaintiff's fourth and fifth claims for violation of the California Elder Abuse  
18 and Dependant Civil Protection Act, Cal. Welf. & Inst. Code §§ 15600 *et seq.*, and  
19 California Civil Code section 3345, respectively. The Court finds this matter  
20 suitable for decision on the papers, without oral argument, pursuant to Local Civil  
21 Rule 7.1. Allstate's motion to dismiss is **GRANTED IN PART** and **DENIED IN**  
22 **PART.**

23 **I. BACKGROUND**

24 Plaintiff Patricia Johnston is an 84-year-old resident of San Diego County.  
25 Allstate is an Illinois-incorporated insurance company that transacts business as a  
26 homeowner's insurance carrier.

27 In July 2012, while Plaintiff was on vacation, a gentleman who had been  
28 conducting fire-abatement work on Plaintiff's property suddenly died in Plaintiff's

1 house. The body went undiscovered for five to seven days, by which time post-  
2 mortem fluids had caused damaged to the home's living room carpet, carpet  
3 padding, and wood sub-floor. Plaintiff was eventually presented with a \$17,476.61,  
4 bill for cleaning services performed by a third party.

5 Plaintiff's home was covered by an insurance policy issued by Allstate.  
6 Plaintiff alleges she filed a claim with Allstate, but the claim was denied. As  
7 relevant to the pending motion to dismiss, Plaintiff alleges Allstate knew she was a  
8 senior citizen and used this fact to the company's financial advantage in improperly  
9 and wrongfully denying her claim without investigation or legitimate basis in law or  
10 fact.

11 On December 17, 2012, Plaintiff filed suit in the San Diego County Superior  
12 Court, bringing claims for (1) "declaratory relief," (2) breach of contract, (3) breach  
13 of the covenant of good faith and fair dealing, (4) breach of the "California elder  
14 abuse act," and (5) "California Civil Code protecting senior citizens." Defendant's  
15 pending motion concerns only the fourth and fifth claims above. On March 12,  
16 2013, Defendant removed the action to this Court.

## 17 **II. LEGAL STANDARD**

18 A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint.  
19 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "While a complaint attacked  
20 by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a  
21 plaintiff's obligation to provide the grounds of [her] entitlement to relief requires  
22 more than labels and conclusions, and a formulaic recitation of the elements of a  
23 cause of action will not do. Factual allegations must be enough to raise a right to  
24 relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555  
25 (2007) (internal quotation marks, brackets and citations omitted).

26 In reviewing a motion to dismiss under Rule 12(b)(6), the Court must assume  
27 the truth of all factual allegations and must construe them in the light most favorable  
28 to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th

1 Cir. 1996). Legal conclusions need not be taken as true merely because they are cast  
 2 in the form of factual allegations. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th  
 3 Cir. 1987); *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).  
 4 Similarly, “conclusory allegations of law and unwarranted inferences are not  
 5 sufficient to defeat a motion to dismiss.” *Pareto v. Fed. Deposit Ins. Corp.*, 139  
 6 F.3d 696, 699 (9th Cir. 1998).

### 7 **III. DISCUSSION**

#### 8 **A. Claim Four: Financial Elder Abuse**

9 The California Elder Abuse Act makes additional damages available to a  
 10 prevailing plaintiff who proves abuse of an elder, or a person age 65 years or older.  
 11 The Act defines various acts as “abuse of an elder,” including “[p]hysical abuse,  
 12 neglect, financial abuse, abandonment, isolation, abduction, or other treatment with  
 13 resulting physical harm or pain or mental suffering.” Cal. Welf. & Inst. Code  
 14 § 15610.07(a). Each of these types of elder abuse is further defined elsewhere in the  
 15 Act.

16 As relevant here, California Welfare & Institutions Code section 15610.30  
 17 states in relevant part: “(a) ‘Financial abuse’ of an elder or dependent adult occurs  
 18 when a person or entity does any of the following: (1) Takes, secretes, appropriates,  
 19 obtains, or retains real or personal property of an elder or dependent adult for a  
 20 wrongful use or with intent to defraud, or both. (2) Assists in taking, secreting,  
 21 appropriating, obtaining, or retaining real or personal property of an elder or  
 22 dependent adult for a wrongful use or with intent to defraud, or both.” Section  
 23 15610.30 references “real or personal property.” Under California law, “[t]he words  
 24 ‘real property’ are coextensive with lands, tenements, and hereditaments” and “[t]he  
 25 words ‘personal property’ include money, goods, chattels, things in action, and  
 26 evidences of debt.” Cal. Civ. Code § 14.

27 Citing the language of section 15657.6, Allstate argues at length that the  
 28 company cannot be liable for elder abuse because it has not actively taken anything

1 from Plaintiff. However, while the Act prohibits the taking of property from seniors,  
2 it equally prohibits the *retention* of property: “‘Financial abuse’ of an elder . . .  
3 occurs when a person or entity . . . [t]akes, secretes, appropriates, obtains, *or retains*  
4 real or personal property of an elder or . . . for a wrongful use or with intent to  
5 defraud, or both.” Cal. Welf. & Inst. Code § 15610.30(a)(1) (emphasis added); *see*  
6 *also* Cal. Welf. & Inst. Code § 15657.6. However, the question remains whether  
7 Allstate can be said to have retained “personal property” in this case.

8 “Since every kind of property that is not real is personal, the property interest  
9 in this case, if it exists, must be personal. Personal property may be incorporeal, i.e.,  
10 without tangible substance, and it may be intangible in the sense that it is a right  
11 rather than a physical object.” *In re Marriage of McTiernan & Dubrow*, 35 Cal.  
12 Rptr. 3d 287, 295 (Cal. Ct. App. 2005) (citations omitted). The issue whether  
13 monies due under a homeowner’s insurance policy are “personal property” appears  
14 to be an issue of first impression in federal and California courts.

15 Although Plaintiff relies on *Fischer v. Aviva Life & Annuity Co.*, 2010 U.S.  
16 Dist. LEXIS 94537, at \*13-15 (E.D. Cal. Sept. 10, 2010), this case is unhelpful for  
17 several reasons. First, the Court’s conclusory finding that “Plaintiffs allegations  
18 [were] sufficient to withstand the motion [to dismiss]” was not supported by analysis  
19 helpful to resolution of the issue before this Court.

20 Second, although the court recounted that “Plaintiffs also argue that their  
21 financial interest in the Policies is personal property and the Defendants acted  
22 wrongfully and deceptively in terminating those policies,” the Court finds nothing in  
23 *Fischer*’s discussion that supports the conclusion that any interest Plaintiff has in her  
24 homeowner’s insurance policy is in fact “personal property” under California law.

25 Finally, the insurance policies in *Fischer* were fundamentally different in kind  
26 from Plaintiff’s homeowner’s insurance policy. The policies in *Fischer* “were  
27 marketed as having the flexibility for the policyholder to determine later whether to  
28 cash out the policy or retain the death benefit of the policy.” *Id.* at \*4. The

1 defendants in *Fischer* cancelled the policies and offered replacement policies. *Id.* at  
2 \*5-6. However, the plaintiffs “cashed out their policies and received less than their  
3 original investment in each policy.” *Id.* at \*6. In this context, the plaintiff could  
4 reasonably have been said to have had a vested property interest in the cash-out  
5 value of the policies. Moreover, the elder abuse claim made sense in this context  
6 given that the insurer was able “to retain the economic benefits of seven years of  
7 premiums” while the plaintiffs cashed out their policies for less cash than they  
8 otherwise would have received.

9 In contrast, the insurance policy in this case does not entitle Plaintiff to a  
10 certain cash-out value. Plaintiff’s entitlement to policy proceeds is contingent upon  
11 the happening of a covered loss event that may never happen. The only persuasive  
12 authority the Court has uncovered on this issue is an unpublished order not available  
13 on Westlaw or Lexis. In *Keshish v. Allstate Insurance Company*,<sup>1</sup> the Honorable  
14 Margaret M. Morrow of the Central District of California denied Allstate’s motion  
15 for judgment on the pleadings on the plaintiffs’ financial elder abuse claim.<sup>2</sup> [See  
16 No. 12-CV-3818-MMM(JCx), Doc. No. 18, Order on Mot. for J. on the Pleadings,  
17 July 30, 2012.] The plaintiffs in *Keshish* submitted a claim under their homeowner’s  
18 insurance policy after their residence and its contents suffered smoke damage. A  
19 dispute arose over the parties’ differing valuation of the covered damage. The  
20 plaintiff sued alleging, among other things, a claim for financial elder abuse. As  
21 Judge Morrow explained, the issue of first impression was “whether an alleged  
22 failure to pay benefits due under an insurance policy constitutes the ‘retention’ of the  
23 elder’s property within the meaning of the [elder abuse] statute.” This issue is the  
24 very issue the Court now considers.

25 Judge Morrow recognized the difference between the types of insurance

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27 <sup>1</sup> In *Keshish*, Allstate was represented by the same counsel as in the instant case.

28 <sup>2</sup> For whatever reason, the parties jointly stipulated to dismiss this claim with prejudice  
after Judge Morrow’s order issued.

1 policies in other cases and the one in *Keshish*: “It is true that the extant cases  
2 concern annuity or life insurance policies, where it is inevitable that the insured or  
3 his or her beneficiaries will ultimately receive some form of payment under the  
4 policy. By contrast, payments under a liability insurance policy are contingent upon  
5 an event that may never occur.” The policy in *Keshish* and the one at bar are  
6 functionally indistinguishable. Both policies cover events that may never occur,  
7 thus making the insured’s rights or legal interests in insurance monies contingent  
8 upon occurrence of a loss event. This difference notwithstanding, Judge Morrow  
9 explained that the plaintiffs had implied, through their allegations, that “Allstate  
10 knew the [plaintiffs] were due certain benefits under the policy, but nonetheless  
11 withheld payments.” Next, Judge Morrow recognized that the elder abuse claim  
12 would “be dependent on the [plaintiffs’] bad faith claim - since it relies on the notion  
13 that Allstate knew that its adjuster had undervalued the claim and that its initial  
14 payment was woefully inadequate.” Despite the claim’s contingent nature, Judge  
15 Morrow concluded that the court could not “say at this stage of the litigation that the  
16 facts pled could not support a finding of liability under the elder abuse statute.”

17 Here, Plaintiff’s entitlement to insurance proceeds is contingent on an event  
18 that may never happen. Thus, Plaintiff’s property interest is unlike the interest in  
19 cases involving annuities and life insurance policies, where the insured’s interest in  
20 the insurance money is vested and it is inevitable that the insured or the insured’s  
21 beneficiaries will receive some form of payment under the policy. However, even  
22 under Plaintiff’s homeowner’s policy, a property interest in money may come to  
23 legal fruition and vest once a loss event that is covered by the terms of the insurance  
24 policy transpires. Thus, once a covered loss event occurs, the insured is legally  
25 entitled to the insurance proceeds by operation of the contractual terms of the  
26 insurance policy. In other words, Plaintiff has vested personal property rights to  
27 money once it is determined that a loss event triggers coverage under the policy.

28 As in *Keshish*, Plaintiff’s elder abuse claim is contingent at this stage of the

proceedings. The claim stands and falls on the trier of fact's finding that Allstate denied Plaintiff's valid claim in bad faith and that Plaintiff was entitled to the insurance money when she submitted her claim. If the trier of fact finds that Allstate acted in bad faith and that Plaintiff was entitled to the money, her rights to the money vested by operation of the terms of her insurance policy. Thus, if Plaintiff was legally entitled to the insurance money at that time, such money was "personal property" within the meaning of the elder abuse claim, and Allstate's retention of this personal property was a potential violation of California's financial elder abuse statute. Contingent as the claim may be, the Court cannot say at this stage of litigation that the facts pled could not support a finding of liability under the elder abuse statute. Consequently, the Court **DENIES** Allstate's motion to dismiss Claim Four.

**B. Claim Five: California Civil Code § 3345**

Plaintiff brings her fifth claim, styled as "unfair or deceptive acts against senior citizens, under California Civil Code section 3345, a provision that allows trebling of statutory punitive damages awards under certain circumstances.

To establish eligibility for treble damages under section 3345, a claim must: (1) be brought by a senior citizen or disabled person; (2) redress unfair or deceptive acts or practices; (3) relate to a separate statutory claim providing entitlement to certain penalties; and (4) the defendant's wrongdoing must be directed to the protected class. Cal. Civ. Code § 3345(b); *Hood v. Hartford Life & Accident Ins. Co.*, 567 F. Supp. 2d 1221, 1225 (E.D. Cal. 2008).

As an initial matter, Allstate's argument that section 3345 applies only to Consumer Legal Remedies Act, California Civil Code §§ 1750 *et seq.*, claims is patently incorrect. The California Supreme Court has considered this very argument and has squarely rejected it. *Clark v. Superior Court*, 235 P.3d 171, 174-75 (Cal. 2010); *see also Novick v. Unum Life Ins. Co. of Am.*, 570 F. Supp. 2d 1207, 1210 (C.D. Cal. 2008) ("§ 3345, however, does not expressly limit its scope to CLRA



1 claims.”). Section 3345 focuses on the remedy available to Plaintiff and applies  
2 only when punitive damages are an available remedy in the case. *Clark*, 235 P.2d at  
3 176. Here, because under certain circumstances a successful plaintiff can recover  
4 punitive damages for financial elder abuse, Cal. Welf. & Inst. Code § 15657.5(c)-  
5 (d), section 3345 potentially applies to this case..

6 Plaintiff may also recover punitive damages on her third claim for “breach of  
7 the covenant of good faith and fair dealing,” which Allstate has not sought to  
8 dismiss. While it is true that “[b]ecause the covenant [of good faith and fair dealing]  
9 is a contract term, in most cases compensation for its breach is limited to contract  
10 rather than tort remedies,” *Kransco v. Am. Empire Surplus Lines Ins. Co.*, 2 P.3d 1, 8  
11 (Cal. 2000), the California Supreme Court has recognized a lone exception to this  
12 general rule for tort damages arising from bad faith breach of an insurance contract  
13 because “an insured may recover damages not otherwise available in a contract  
14 action, such as emotional distress damages resulting from the insurer’s bad faith  
15 conduct and punitive damages if there has been oppression, fraud, or malice by the  
16 insurer,” *Cates Constr., Inc. v. Talbot Partners*, 980 P.2d 407, 416 (Cal. 1999)  
17 (citations omitted). Accordingly, Plaintiff may recover treble damages under section  
18 3345 if she prevails on her third claim and establishes the requisite bad faith.  
19 *Accord Novick*, 570 F. Supp. 2d at 1211 (finding section 3345 was available in  
20 context of bad faith claim); *Hood*, 567 F. Supp. 2d at 1230 (“[P]laintiff has alleged a  
21 statutory remedy under [Cal. Civ. Code] Section 3294, to which he seeks to apply  
22 Section 3345.”)

23 The foregoing notwithstanding, section 3345 “is not an independent cause of  
24 action and will only apply if Plaintiff[] successfully prove[s] liability under [another]  
25 claim.” *Gwin v. Pac. Coast Fin. Servs.*, 2010 U.S. Dist. LEXIS 40035, at \*17 (S.D.  
26 Cal. Apr. 23, 2010) (Moskowitz, J.); *see also Ramsour v. JP Morgan Chase Bank*,  
27 2011 U.S. Dist. LEXIS 94724, at \*11-12 (S.D. Cal. Aug. 23, 2011) (Hayes, J.).  
28 Insofar as section 3345 is not an independently-actionable claim, the Court



1 **GRANTS** Allstate's motion. However, the Court grants Plaintiff leave to amend her  
2 Complaint, but only for the limited purposes of alleging section 3345 eligibility  
3 under the "prayer for relief" section.

4 **IV. CONCLUSION**

5 Based on the foregoing, Allstate's motion to dismissed is **GRANTED IN**  
6 **PART** and **DENIED IN PART**. Accordingly, Claim Five is **DISMISSED with**  
7 **leave to amend** to add California Civil Code section 3345 to the "prayer for relief"  
8 section.

9 **IT IS SO ORDERED.**

10 DATED: May 23, 2013

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12 Hon. Michael M. Anello  
13 United States District Judge  
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